Does Motive Matter? Court Shifts on Whistleblower Claims

By Michael Ellis
Director of Claims

EMPLOYEES WHO BRING whistleblower claims will likely have an easier time in the future, thanks to several recent Michigan Supreme Court decisions.

This could not have happened at a more inopportune time, since recent research shows a surprising increase in whistleblower claims over the last several years. Attorneys practicing labor law sensed an upswing in the number of cases, but many were still shocked by Southfield attorney Daniel D. Swanson's research revealing a 112-percent increase in reported appellate opinions in this area of the law over the past eight years.

Thus far, 2013 has seen two Michigan Supreme Court decisions that, some argue, have eased the burden of plaintiffs in such litigation and are therefore noteworthy.

Whistleblower Claims: An Overview

Historically, to establish a prima facie case under the Whistleblower Protection Act (WPA), plaintiffs needed to show only that:
1. They were engaged in whistleblowing (for the good of the public)
2. They suffered an adverse employment action, and
3. There was a causal connection between the protected activity and the adverse employment action.

Under this protocol, once a plaintiff tips the scales in his favor by establishing facts tending to support his claim that an employer illegally retaliated for a whistleblower activity, a presumption of illegality arises. The burden of proof shifts 180 degrees to the employer, who must then establish legitimate business reasons for its adverse employment-related actions.

Under the business judgment rule, if the defendant (employer) can establish a legitimate business reason for the adverse action toward the plaintiff (employee), the burden again shifts, and the plaintiff must establish that the proffered legitimate reason for the employer's adverse action is in fact a mere "pretext" or fiction.

Debano-Griffin and the Business Judgment Rule

In Debano-Griffin v. Lake County, the defendant argued that it terminated the plaintiff's position simply as part of a countywide cost-cutting measure and was protected by the business judgment rule. Cheryl Debano-Griffin countered that she was not challenging the decision to cut costs, but instead that the county's business decision to eliminate her position "was false or had 'no basis in fact.'"

Debano-Griffin argued that the county was not, in fact, "facing a budget crisis." She did this by "questioning the propriety of the audit report and the credibility of [county clerk] Myers." The Supreme Court found that the plaintiff established her claim sufficiently, despite the county's assertion of the business judgment rule.

Other Defenses Also Rejected

The defendant also argued that Debano-Griffin's claim required the courts to interfere with the county board's legislative policy determinations. The Court noted that legislative immunity is expressly waived in the WPA and that the Separation of Powers language of the Michigan Constitution does not protect any branch of government from its own illegal acts as alleged and established in this case.

continued on page 4
When the Media Arrives, Will You Be Ready for the Spotlight?

By Anthony Huey, President
Reputation Management
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THE MODERN DEFINITION
of a local government leader’s bad day: Arriving for work to find Bill O’Reilly or Anderson Cooper camped out in the front lobby.

But even a routine call from a local reporter is enough to cause panic in many executives. They may wonder: “What do they want?” “What do I say?” “Why me?”

Increasingly, local government news is headline news, no longer relegated to the metro section. Critical stories about labor disputes, fiscal problems, corruption, and negligence often replace crime and politics on the front page. Local government news is hot. Which leads to the real question: Is your organization ready for intensive news media scrutiny?

To deal with the media, savvy leaders are learning “journalistic jujitsu” by attending classes in media training and employing personal media coaches. Release the story...but control the flow of negative information in a responsible manner. By being candid and careful, government leaders can turn a bad situation into a positive public relations opportunity. All of this is important for one simple reason: Perception is truth!

Need for a Trained Response

But understanding the media and learning how to deal with reporters is not something that can be absorbed through osmosis. Media response workshops have replaced “stress management” as the training of choice in many organizations. The sessions, usually conducted by former journalists, give executives the opportunity to learn privately from their mistakes, rather than read about them in tomorrow’s newspaper or instantly on Twitter.

Executives are learning how to quickly bump negative questions, then run to their own positive comment on the situation. They learn how to stay on message and understand how to bridge an unfair question with a quick phrase: “That’s an interesting point, Tom, but the bigger question here is what our department has done to improve the situation. For example...”

And the surprising result of this candor is that an executive’s credibility is enhanced among those who matter most: employees, customers, and citizens.

Besides increasing your credibility, being forthright with a reporter usually gets his or her attention. More than likely, a reporter who has been treated fairly will take a second look at releases touting new services, rather than pitching them in the round file. The upshot is positive coverage of the “good news” items you want to get in front of your residents.

An Essential Skill

In the modern world of Twitter, Facebook, and other instant communication vehicles, dealing with the media isn’t something to be passed off to other staff members or dismissed as unimportant. It begins with your commitment to learn and follow basic guidelines.

By learning the how-tos of media interviewing, local government leaders can calmly walk through the door of their offices, even if “60 Minutes” is waiting in the lobby. As a modern government leader, you need to be prepared, coached, and aggressive. Then you just might be willing to invite Anderson Cooper in for a cup of coffee!

Anthony Huey is owner of Reputation Management Associates, one of the nation’s leading communications training and crisis consulting companies. He has presented more than 1,450 media, crisis, and presentational skills training workshops, seminars, and speeches in his career.

Media Training Session

Featuring
Anthony Huey
@MMRMA’s
Training
Center in
Livonia
Wednesday, September 18,
9 am to noon

Want more information on this timely topic? Author Anthony Huey will present clear, easy-to-use techniques for managing media interviews and turning tough questions into opportunities.

Free to MMRMA members
Register at mmrma.org or contact Cara Kowal at 734 513-0300.
Risk Control Team Helps Members Employ Best Practices

By Michael Rhyner
Executive Director

ONE OF MMRMA’S primary aims is to reduce the frequency and severity of property and liability losses for our member municipalities. To fulfill this purpose, our policy is to identify hazards that result in loss and to work with members to mitigate or entirely avoid these risks. Our risk control programs provide a host of products and services designed to achieve these outcomes.

Most prominent are MMRMA’s Risk Avoidance Program (RAP) grants, which provide funds directly to members for risk control functions, various resources such as model policy and procedure brochures, and a comprehensive schedule of training opportunities.

Risk Control Consultants Provide Onsite Support

Another vital element of our risk control element is direct field service, through which we provide members with individualized support and assist them in controlling losses. The goal is to achieve best practices in risk management.

A “best practice” is defined as a method or technique that has consistently shown results superior to those achieved through other means. It can also be thought of as a “best in class” distinction. Helping members identify and implement best practices is consistent with our shared core values, which promote excellence and encourage us to be the best at what we do, both individually and as an organization.

Data Informs Future

Data is a powerful tool in risk control efforts. MMRMA’s risk control consultants make regular visits to members to gather information relating to risk management issues. This data allows MMRMA to better focus our programs and services to meet the unique needs of each member. Whether it is a model policy and procedure, a recommended training opportunity, or assistance with a RAP grant application, we can tailor our risk control programs to address each member’s specific needs.

Successful risk control measures employed by one MMRMA member become part of a knowledge base that is leveraged to reduce losses among other members and MMRMA as a whole.

Through this ongoing work, we can help MMRMA members measure their progress in achieving best practices using benchmarks and other metrics. Not only does this help each member reduce risk, but it also serves to improve MMRMA’s overall performance by reducing losses across the board. This, in turn, will result in cost savings for MMRMA and our members.

The best practices initiative is another creative way in which MMRMA protects members, their officers and employees, and the general public from injury and financial loss.

MMRMA’s collective expertise encompasses parks and recreation, correctional facilities, law enforcement, administration, fire/EMS, 911, and public services.
MMRMA Annual Meeting: A Chance to Grow

This year's annual meeting at the Grand Traverse Resort in Acme, Michigan, will help registered member attendees cultivate skills and nurture relationships with their colleagues from across Michigan.

Speakers Address Personal and Professional Growth

MMRMA has prepared an agenda that will inform and inspire. Our renowned speakers deliver strategies that matter to our members, and this year's lineup is no exception.

Josh Linkner will share his insights into creativity and the art of reinvention. Anna Post will enlighten us on business etiquette and civility in the workplace. And Ray Saint will discuss essential communication tools to help individuals and organizations succeed.

Networking and New Member Orientation

As always, our guests will have plenty of time to network and share ideas with each other and with MMRMA's staff and service providers.

In addition to the Resource Room, we have added an orientation session for new MMRMA members and first-time attendees of the Annual Meeting. Every year, we are fortunate to see several new faces among our familiar friends. While we have always strived to make these newcomers feel at home, we're taking it to the next level with this formal welcome session.

Thanks to the attendees who generously participate in making the Annual Meeting a standout event for MMRMA each year. See you there!

Leadership expert Ray Saint will share practical communication tips you can use both personally and professionally.

Whistleblower Claims, continued from page 1

Employee Motive No Longer Relevant

For many years, the courts have held that the whistleblower must have a pure heart and be acting for noble reasons. These holdings have indicated that, if a whistleblower acted for personal gain, this would defeat his claim. In May 2013, in Whitman v. City of Burton, the Michigan Supreme Court held language in those earlier decisions to be dicta and therefore not binding.

In Whitman, the Court ruled that: "Nothing in the statutory language of the WPA addresses the employee’s motivation for engaging in protected conduct, nor does any language in the act mandate that the employee's primary motivation be a desire to inform the public of matters of public concern. Rather, the plain language of MCL 15.362 controls, and we clarify that a plaintiff's motivation is not relevant to the issue whether a plaintiff has engaged in protected activity and that proof of primary motivation is not a prerequisite to bringing a claim."

This decision disavows inconsistent interpretations of the 1997 Michigan Supreme Court decision Shallal v. Catholic Social Services of Wayne County, which arguably required the plaintiff to establish an "altruistic" motive for his whistleblowing activity and thus something other than his own financial or "vindictive" interests.

By effectively ruling that "motive does not matter," the Court has made it easier for plaintiffs to win whistleblower lawsuits.

In this difficult economic climate, and with more such suits moving through the system, these two decisions should be a matter of concern to all MMRMA members.